SUPREME COURT, U. S.

Number 513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter

of

DAN A. SPENCER

On Appeal from the Supreme Court
of the State of Louisiana

BRIEF ON BEHALF OF RESPONDENT TRIAL JUDGE

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OCTOBER TERM, 1960

No. 513

IN THE MATTER OF DAN A. SPENCER

On Appeal From the Supreme Court of the State of Louisiana

BRIEF FOR RESPONDENT

STATUTORY PROVISIONS INVOLVED

Louisiana Code of Civil Procedure

Art. 221. Kinds of contempt

A contempt of court is any act or omission tending to obstruct or interfere with the orderly administration of justice or to impair the dignity of the court or respect for its authority.

Contempt of court is of two kinds, direct and constructive.

Art. 222. Direct contempt

A direct contempt of court is one committed in the immediate view and presence of the court and of which it has personal knowledge, or a continuation of failure to comply with

"2. Upon the filing in this court of the record brought up by appeal, counsel for the appellant shall enter his appearance * * * The case will then be placed on the appellate docket."

Even if the documents of appellant could be considered as an attempted appeal from the First Judicial District Court, jurisdiction has never been completed. Appellant has not lodged the record here. Respondent, Judge Williams, has filed the district court record with this Court in support of his motion to dismiss. The sole purpose of this filing was that this Court could have before it the complete record for determination of jurisdiction. Appellant, in his brief, has referred extensively to the items from the district court record not filed by him. This case, if reached on its merits, should not be decided on the deficient record filed by appellant.

C. Appeal Presents No Substantial Constitutional Question

At issue in this case is the right of the State of Louisiana legislatively to grant courts the control over pleading content within the narrow limits specified in the legislation. Appellant has attacked this legislation as being constitutionally defective on its face in violation of First Amendment free speech rights and being constitutionally defective as applied to appellant, in violation of Fourteenth Amendment rights.[7]

[7] Brief of appellant, page 2. The statute attacked is Art. 222 of the Louisiana Code of Civil Procedure. Mr. Spencer's pleading was found contemptuous under the definition of direct contempt of Art. 222. The proceedings against him, however, were *not* summary, as authorized by Art. 223. Art. 224 defines constructive (indirect) contempts. Art. 225 establishes the more protective procedure for this contempt. These proceedings were tried under Art. 225, affording all constitutional safeguards for minor offenses. *Constitutional authority to punish summarily direct contempts is not an issue in this case.* Articles 222 and 225 are reproduced in full, pp. 1-3, *supra*.

After being cited for contempt, Mr. Spencer, on March 28, 1968, instituted an action in the United States District Court for the Western District of Louisiana.[8] In that action, appellant sought to enjoin further state court proceedings under the contempt rule. Attacking the constitutionality of Articles 221 *et seq.*, he obtained the convocation of a three-judge court. His constitutional attack there made was the same attack made here.[9] A temporary restraining order issued. Considering these issues raised by appellant, the three-judge court decided "that no substantial constitutional question is presented; and that the case was not appropriate for a decision by a three-judge court under 28 U. S. C. §2281", and dissolved itself. The matter was returned to the single judge for appropriate disposition.[10] After a hearing on August 16, 1968, on the motion of Judge Dixon for a summary judgment, the summary judgment was granted and Mr. Spencer's petition dismissed. Each issue now raised by appellant was raised by him in this prior federal proceeding and painstakingly decided by the District Judge.[11] After rendition of the judgment of the Federal District Court (opinion dated September 30, 1968), an appeal was taken by Mr. Spencer to the Fifth Circuit Court of Appeals. While this appeal was pending, the state proceedings were

8 Reported as Spencer v. Dixon, 290 F. Supp. 531 (1968).

9 "In addition to the foregoing, complainant alleged that Articles 221, *et seq.*, of the Louisiana Code of Civil Procedure are unconstitutional, both on their face and as attempted to be applied to complainant. He asserted that these Articles are unconstitutional on their face in that they are an overly-broad restriction of freedom of speech guaranteed him by the Constitution of the United States through the First and Fourteenth Amendments. He further asserted " " " [that] these Articles are unconstitutionally applied against complainant in that they limit his right of free speech to make a truthful charge in a pleading against a judge." 290 F. Supp. 532, 533.

10 290 F. Supp. 535.

11 See Opinion 290 F. Supp. 531.

voluntarily held in abeyance by Judge Williams. Thereafter, pursuant to a motion filed by Mr. Spencer for dismissal, an order was issued by the United States Court of Appeals for the Fifth Circuit dismissing the appeal.[12]

Mr. Spencer chose, as was his right, to litigate these issues by injunctive process before the lower federal courts. He lost. He appealed. He voluntarily dismissed his appeal. This action speaks loudly of the insubstantiality of the purported constitutional issues. Appellant has been afforded ample federal forum for presentation of each issue now sought to be adjudicated. Having voluntarily dismissed his constitutional attack on one occasion, he should not now again be allowed to revive it in the federal system. For the reasons expressed in Parts II and III of this brief, we suggest that Mr. Spencer's dismissal of his appeal was appropriate. The constitutional issues are insubstantial.

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12 Proceeding No. 27290 U. S. Court of Appeals for the 5th Circuit. Order issued March 17, 1969.

II.

CONSTITUTIONALITY OF ARTICLE 222

Louisiana, by legislation,[13] directs courts to control pleading content to the end that insulting, abusive or discourteous language of an attorney irrelevantly directed to a judge, or contumacious or insolent behavior tending to impair the dignity or respect of a court be proscribed. This conduct is made contumacious by definition. This is the conduct for which Mr. Spencer was cited for contempt. He filed a pleading, as attorney, accusing the trial judge of "corruption, favoritism, oppression, and misfeasance in office". As applied to him, Mr. Spencer seeks to have Article 222 of the Louisiana Code of Civil Procedure declared unconstitutional as violative of First Amendment free speech rights. We deal here with a narrow aspect of the contempt subject: control over pleading content. The Louisiana statute is attacked as being an abridgment of free speech, restricting a lawyer's duty for effective advocacy, and as infected with over-breadth. Because the conduct is punishable by summary proceedings, appellant claims, the statute fails to meet the "strictest standard of constitutionality".[14]

A review of the development and policy therefor of contempt jurisdiction concerning the duty of courts to control abusive language of counsel impairing the dignity and respect for authority, we submit, answers the constitutional question.

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13 Louisiana Code of Civil Procedure, Arts. 221 *et seq.*, Louisiana Code of Criminal Procedure, Arts. 20 *et seq.*

14 Brief of appellant, pages 7, 8. Mr. Spencer was not tried or punished by the "summary" procedure available for direct contempts. He was afforded all constitutional rights he claims summary procedure infringes. See pp. 20-22, *infra*.

It is suggested[15] that contempt authority is an anachronistic historical generalization of the protection of kings against criticism by their subjects, adopted by the judiciary for the insulation of judges. Illegitimate conception, it is argued, renders all contempt constitutionally suspect. Whether Blackstone's oft-repeated declaration[16] be dogma or dicta,[17] Louisiana, in keeping with her civilian tradition,[18] has since earliest times made statutory the authority of courts to cite for contempt. It has defined contempt by statute.[19] By mandate of

15 Brief of appellant, pages 15 & 16. Goldfarb, The Contempt Power, Chapter I (Columbia University Press, 1963).

16 "Some of these contempts may arise in the face of the court; as by rude and contumacious behavior, by obstinacy, perverseness, or prevarication; by breach of the peace, or any wilful disturbance whatever.

* * * *

"The process of attachment for these and the like contempts, must necessarily be as ancient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an incident inseparably attendant upon every superior tribunal. Accordingly we find it actually exercised as early as the annals of our law extend." 4 Blackstone, Commentaries on the Laws of England, p. 285 (15th Ed., A. Strahan, printer, 1809).

17 See *Bloom v. Illinois*, 391 U. S. 194, 198, 20 L. Ed. 2d 522, 527; 88 S. Ct. 1477.

18 Louisiana Revised Civil Code, Article 1: "Law is a solemn expression of legislative will."

19 Louisiana Code of Practice of 1825, Articles 131, 132; statute of March 27, 1925, Louisiana General Session Laws; Louisiana Revised Statutes of 1870, § 329. Substantially, the earliest legislative enactment concerning contempt was contained in the 17th section of the Act of 1805, chapter 26, 2 Martin's Digest 326. (This was the Louisiana Practice Act of 1805, which its author, Edward Livingston, immodestly boasted, inaugurated a system of procedure "so simple and free from useless forms that a student in his office had only to achieve a complete mastery of it in the space of seven hours." 1 McMahon, Louisiana Practice iii.) This Act (before statehood) gave the superior courts of the territory of Orleans power to punish contempts. The 19th section of the first judicial act of 1813 repealed these provisions giving the superior courts authority "to punish all contempts by fine not exceeding $50 for each offense, and also by imprisonment not exceeding 10 days." Prior to the adoption of the Code of Practice and the Civil Code of 1825, many of the laws of Spain were still in force in Louisiana. During the period from the date of the Louisiana Purchase to 1825, the substantive laws of contempt concerning attorneys and judges was contained in *Las Siete Partidas*, third

continued

her Constitution,[20] the legislature is directed to specify the contempt power of courts. Pursuant to this mandate, the questioned statute,[21] and a similar statute concerning contempt before the criminal courts of the state[22] were adopted on recent revision of the codes of civil and criminal procedure.

The historical analysis of the development of contempt made by Goldfarb[23] concludes that of civilized nations only the Anglo-American legal system has reposed in its judiciary broad summary contempt power. Goldfarb, however, admits one exception, that being of criminal contempts directed to punishment for past acts.[24] This is the lone type of contempt with which this case deals. Louisiana, while cognizant of the common law development of contempt and of the writings of Blackstone, founds its contempt authority on the civilian con-

continued

Partida which forbade judges to suffer the arrogant and indecorous language of lawyers. Judges were directed to demean themselves that their authority may not be contempted. Contempt by any lawyer toward the court, by expression or gesture, could be instantly punished, at least by suspension from practice. See *De Armas' Case*, 10 Martin (O. S.) 158 (Eastern District July term 1821). This is probably the oldest Louisiana case concerning contempt, and curiously is similar in many respects to the instant case. In this case (as reported in 10 Martin [O. S.] 123) an attorney made indecorous expressions directed to the court in a written application for rehearing. On having his attention invited to his intemperate language, he declined to amend his application. An order was entered that he answer for contempt. On appearing, "in his attempt at a justification, forgot himself so far as to suggest that the court were disposed to punish him, as the author of some publications, in which he had denounced, in the *Ami desloix*, their declaration made in May last." These writings apparently accused the court of evil disposition toward those portions of the citizenry "whose vernacular was not the English". Compare these actions with Mr. Spencer's here, and with his past performance before the Louisiana Supreme Court in the unrelated matter of *Spencer v. Dixon*, 181 So. 2d 41, 248 La. 604 (La. S. Ct. 1965).

20 Constitution of the State of Louisiana, 1921, Article 19, Section 17: "The power of the courts to punish for contempt shall be limited by law."

21 Article 222 of the Louisiana Code of Civil Procedure.

22 Article 20 *et seq.* of the Louisiana Code of Criminal Procedure.

23 Goldfarb, The Contempt Power, Chapter 1 (Columbia University Press, 1963).

24 *Ibid.* p. 2.

cept. In Louisiana, contempt was not judge-made for protection of the sensibilities of judges. Contempt authority was legislated by the first legislative body of the territory of Orleans. It is through this legislation, not through an "inherent power" that Louisiana courts are granted contempt authority. It was the execution of the legislative mandate that justice should be orderly administered by courts, unfettered by contumacious conduct of counsel, that this contempt citation issued. It was not a protection of the sensibilities of the individual occupying the office of judge. Although the source of authority is different in Louisiana from common law jurisdictions, the policy behind the authority is the same and was well stated by the Supreme Court of Nebraska as:

> "* * * There is no possible disposition to question the right of any and every person to criticize the action of the court or its judges; but if the officers of the court, as attorneys, are permitted to assail the judges by briefs or other papers filed in and made a part of the records of the court, and thereby seek by questionable and unfair means to destroy the respect which is and should be entertained for the court as the highest judicial tribunal in the state, it would not be long until all respect for it would, and probably should, be lost. There is a well-recognized duty imposed upon the judge or judges to see that the respect and integrity of the courts are maintained, and, unpleasant as it may be, we cannot evade or flinch from the discharge of that duty."[25]

Louisiana has historically reprobated abusive language of counsel either in argument or pleading content as being a threat to the authority and dignity of its judiciary. The exer-

25 *Re Dunn*, 85 Neb. 606, 124 NW 120 (1909).

cise of this power has not had as its motive or result the suppression of criticism.[26]

Within the federal system, the Judiciary Act of 1789 gave federal courts "the power * * * to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any case or hearing before same."[27]

This Court has since earliest times assumed the inherent jurisdiction in the federal system for contempt, stating in 1812:

> "Certain implied powers must necessarily result to our courts of justice from the nature of their institution. * * * To fine for contempt, imprison for contumacy, inforce the observance of order, etc., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; * * * "[28]

In 1821, this Court had occasion for the first time to consider the contempt authority of Congress. In passing on Congress' contempt power, Justice Johnson stated in clear terms the contempt authority of the federal courts and the reason for that authority:

> "But if there is one maxim which necessarily rides over all others, in the practical application of government, it is, that the public functionaries must be left at liberty to exercise the powers which the people have intrusted to them. The interests and dignity of those who created them, require the exertion of the powers indispensable to the attainment of the ends of their creation. Nor is

26 *De Armas' Case*, 10 Martin (O. S.) 158 (1821); *State v. Soule*, 8 Robinson 500 (1844); *State v. Keene*, 11 La. 596 (1837); *Lanoix et al v. Home Indemnity Co. of New York*, 204 La. 1044, 16 So. 2d 834.

27 Judiciary Act of 1789, Section 17, 1 Stat. 83.

28 *U. S. v. Hudson*, 11 U. S. (7 Cranch) 32, 34, 3 L. Ed. 259, 260.

a casual conflict with the rights of particular individuals any reason to be urged against the exercise of such powers. * * * The unreasonable murmurs of individuals against the restraints of society, have a direct tendency to produce that worst of all despotisms, which makes every individual the tyrant over his neighbor's rights.

"That 'the safety of the people is the supreme law', not only comports with, but is indispensable to, the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is, that courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution."[29]

An analysis of the development of contempt in this country to that time (1880) was recited by this court in *Ex Parte Terry*.[30] This court stated:

"But there is another rule, of almost immemorial antiquity, and universally acknowledged, which is equally vital to personal liberty and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether as-

29 *Anderson v. Dunn*, 19 U. S. (6 Wheaton) 204, 226, 227, 5 L. Ed. 242, 247, 248. This case, insofar as it held Congress inherently empowered to issue and punish for contempt, was overruled in *Kilbourn v. Thompson*, 103 U. S. (13 Otto) 168, 26 L. Ed. 377 (1880). Despite the fact that *Anderson* was overruled as to its holding concerning Congressional contempt authority, the declaration in the opinion of the judicial authority for contempt has subsequently been cited with approval by this court (*Ex parte Terry*, f. n. 30). The reason and extent of that authority as to courts is as valid now as then. Also appropriate is the advice given by Justice Johnson to the would-be contemptor who complains of the inconvenience of contempt authority: "If the inconvenience be urged, the reply is obvious; there is no difficulty in observing that respectful deportment which will render all apprehension chimerical." 5 L. Ed. 249.

30 128 U. S. 289, 32 L. Ed. 405, 9 S. Ct. 77 (1888).

> sailed by the illegal acts of the Government or by the lawlessness or violence of individuals. It has relation to the class of contempts which, being committed in the face of a court, imply a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law. Blackstone thus states the rule: 'If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination.' "[31]

These statements reflect the historical assumption that our courts have a constitutional right to exercise contempt authority for the purpose of imposing respect and decorum in the presence of the court and to punish those contempts which imply a purpose to impair its authority or to obstruct its business.

In 1949, this Court had before it *Fisher v. Pace*,[32] a contempt matter dealing with the right of an attorney to comment in the course of a trial. For conduct which was mild in comparison to Mr. Spencer's, Mr. Fisher was summarily punished for contempt[33] as a result of a colloquy between the Court and counsel. After affirmation by the Supreme Court of Texas, the case came to this Court by certiorari. The conviction for contempt was sustained by this Court against an attack that the conviction violated Fourteenth Amendment rights of Mr. Fisher. The dissent of Justice Douglas, concurred with by Justice Black, focused disagreement with the majority on

31 128 U. S. 307, 32 L. Ed. 410.
32 336 U. S. 155, 93 L. Ed. 569, 69 St. Ct. 425.
33 The report does not indicate that Texas had a statute defining contempt.

free speech rights.[34] Although neither the majority opinion nor the dissents of Justices Murphy or Rutledge specifically discuss free speech, we assume that the majority opinion answered the dissent's free speech argument with the following language:

> "The conduct of a judge should be such as to command respect for himself as well as for his office. We cannot say, however, that mildly provocative language from the bench puts a constitutional protection around an attorney so as to allow him to show the contempt for judge and court manifested by this record, particularly the last few sentences of the altercation."[35]

In 1968, this Court in *Bloom v. Illinois*,[36] chronicled and expanded constitutional curbs against abuse of contempt authority. *Bloom* is of special significance here, for it carefully lays down constitutional standards against which this attacked contempt statute may be measured. These standards, as repeated or expanded in that opinion, are:

> 1) Careful distinction is drawn between direct and indirect contempts (those committed in the presence of the court and those committed outside its presence). Indirect contempts require adversary proceedings. Direct contempts may be disposed of without hearing or evidence.[37] The Louisiana Code of Civil Procedure

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34 "I do not think freedom of speech should be so readily sacrificed, even in a courtroom. * * * * This lawyer was the victim of the pique and hotheadedness of a judicial officer who is supposed to have a serenity that keeps him above the battle and the crowd." 336 U. S. 165, 166, 93 L. Ed. 576. The dissents of Justices Murphy and Rutledge objected to the summary nature of the punishment inflicted under these facts.

35 336 U. S. 162, 163, 93 L. Ed. 574.

36 391 U. S. 194, 20 L. Ed. 2d 522, 88 S. Ct. 1477.

37 *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405, 9 S. Ct. 77 (1888); *In re Savin*, 131 U. S. 267, 33 L. Ed. 150, 9 S. Ct. 699 (1889).

divides contempts into direct and constructive. Direct contempts are those committed in the immediate view and presence of the court (including the use of abusive language by an attorney in irrelevant criticism of a judge or in insolent behavior of an attorney toward a judge, tending to impair the dignity of the court). The procedure for hearing of these contempts is set out in Article 223. Constructive contempts (all contempts other than direct ones) are defined in Article 224, punishable under the procedure set out in Article 225, which requires notice and hearing. It is significant that Mr. Spencer, though committing a direct contempt as defined by the Louisiana codal article, was punished by the more protective procedure for constructive contempt.

2) Those accused of criminal contempt are presumed innocent and cannot be compelled to testify against themselves.[38] Mr. Spencer was afforded these rights.

3) Persons accused of constructive or indirect contempt must be advised of the charges, have a reasonable opportunity to meet them, including assistance of counsel; must have the right to call witnesses and give testimony.[39] Notice is required by Article 225 of the Code of Civil Procedure for a hearing on constructive contempt. The right of counsel and the right to present

[38] *Compare* *Ex parte Black*, *Stone & Ramey Co.*, 221 U.S. 418, 31 L.Ed. 787, 31 S.Ct. 492 (1911).

[39] *Cooke v. United States*, 267 U.S. 517, 69 L.Ed. 767, 45 S.Ct. 390 (1925). Louisiana enforces these constitutional safeguards. *See State v. Thompson*, 163 La. 93, 111 So. 611 (La. Sup. Ct. 1927).

evidence is preserved.[40] Again, although this was a direct contempt, the protective procedures of an indirect or constructive contempt were afforded Mr. Spencer.

4) Those accused of criminal contempt are entitled to a public trial before an unbiased judge.[41] These protections were afforded Mr. Spencer. The hearing was not before the judge against whom the vituperation was directed. No complaint is made that the trial judge was biased.

5) *Bloom* itself granted persons accused of serious contempts (those for which a punishment is inflicted in excess of six months at hard labor) a right to trial by jury. The maximum punishment for the first offense of this type of contempt is twenty-four hours imprisonment and a fine of $100; for subsequent contempt before the same court, by imprisonment for not more than ten days and fine of not more than $250.[42]

It is the absence of traditional protection afforded those accused of offenses in certain summary contempt proceedings that seems to prompt Goldfarb, in *The Contempt Power*, to argue for the abolishment of all contempt. Whether

40 In this case, Mr. Spencer chose to represent himself. A 14. The only testimony sought to be produced by Mr. Spencer was that of four judges of the First Judicial District Court. Judge Williams asked the thrust of the testimony and, on being advised, ruled the testimony irrelevant and therefore inadmissible. A 19, 20. Mr. Spencer was again asked if he had anything further, to which he replied, "No, sir. Your Honor, only to make the offer of proof to the effect that I have stated earlier, and since the Court ruled it inadmissable I will rest my case." A 22.

41 *In re Oliver*, 333 U. S. 257, 92 L. Ed. 682, 68 S. Ct. 499 (1948); *Offutt v. United States*, 348 U. S. 11, 99 L. Ed. 11, 75 S. Ct. 11 (1954).

42 Louisiana Revised Statutes 13:4611.

his argument be valid or not for the instant case is immaterial, as Mr. Spencer was afforded all of the traditional and constitutional rights for one accused of a "petty"[43] offense. Appellant argues:

> "Considering this history, the inherent characteristics of contempt, and the view that 'the contempt power is a potential instrument of oppression' * * * Art. 222(3) must be held to violate the First Amendment on its face."[44]

We are not dealing here with a summary proceeding, the alleged "inherent characteristic of contempt". The exercise of this contempt power is no more "a potential instrument of oppression" than the exercise of any legitimate governmental power. The constitutional vice, if any, must therefore be inherent in control of pleading content, not because the power is expressed in a contempt statute.

Thus narrowed, the issue is: May a state control content of the pleadings filed before its courts, reprobating therefrom abusive and insulting language irrelevantly directed to the trial judge to the impairment of its dignity or respect for its authority? This power is challenged by appellant as violative of First Amendment free speech rights.

Louisiana asserts this right through its narrowly-drawn contempt statute. Many jurisdictions, including Louisiana, also exercise this power through disciplinary rules for attorneys.[45] If the First Amendment prohibits one, it prohibits the other.

43 As the term is used in *Bloom*.

44 Brief of appellant, page 16.

45 See Robert Stern and Eugene Gressman, *Supreme Court Practice*, p. 477 (4th Ed., The Bureau of National Affairs, Inc., 1969); *Lanois v. Home Indemnity Co. of N. Y.*, 204 La. 1044, 16 So. 2d 834 (La. S. Ct., 1944).

Court rules have reprobated abusive pleading content irrelevantly directed to a judge or attorney and have enforced these rules by contempt process.

Canon 1 of the Canons of Professional Ethics of the American Bar Association[46] provided:

> "1. The Duty of the Lawyer to the Courts.
>
> "It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected."

Canon 1 of the Canons of Ethics of the Louisiana Bar Association is, and was in 1968, identical to the quoted Canon 1 of the American Bar Association. Section 36 of the Ethical Considerations of Canon 7 of the Code of Professional Responsibility of the American Bar Association[47] provides:

> "EC 7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and

46 These Canons were adopted in 1908 and were in force until January 1, 1970, when replaced by the Code of Professional Responsibility of the American Bar Association.

47 Effective January 1, 1970.

> above-board in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration."

Disciplinary Rule 7-106 of the Code of Professional Responsibility of the American Bar Association provides, in part:

> "DR 7-106 Trial Conduct
>
> * * * *
>
> "(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> * * * *
>
> "(6) Engage in undignified or discourteous conduct which is degrading to a tribunal."

Mr. Spencer, in a motion for recusation, accused the trial judge of being unfit for office by virtue of "corruption, favoritism, oppression and misfeasance in office."[48] For this conduct he was cited for contempt, the rule for contempt alleging that he

> "* * * did file a pleading * * * which contained scandalous, insulting, and abusive language in irrelevant criticism of the judge of said court, * * * and which language, * * * impairs the dignity of the court and the respect for its authority, contrary to the law of the State of Louisiana."[49]

The legislative authority for this contempt is Article 222 of

48 A 8, 9
49 A 10

the Louisiana Code of Civil Procedure, which provides in pertinent part:

"ART. 222. DIRECT CONTEMPT

"A direct contempt of court is one committed in the immediate view and presence of the court and of which it has personal knowledge. * * *.

"Any of the following acts constitutes a direct contempt of court:

"(1) Contumacious, insolent, or disorderly behavior toward the judge, or an attorney or other officer of the court, tending to interrupt or interfere with the business of the court, or to impair its dignity or respect for its authority;

* * * *

"(3) The use of insulting, abusive, or discourteous language by an attorney or other person in open court, or in a pleading, brief, or other document filed with the court in irrelevant criticism of another attorney or of a judge or officer of the court; * * * *."

Appellant urges the unconstitutionality only of Article 222(3). Involved in this case are both subsections 1 and 3. The citation for contempt against appellant alleged violations of both subsections 1 and 3. If over-breadth of speech limitation is a constitutional vice of Article 222 because it interdicts "contumacious, insolent, * * * behavior toward the judge * * * of the court, * * * to impair its dignity or respect for its authority" and the "use of insulting, abusive or discourteous language by an attorney * * * in a pleading * * * in irrelevant criticism * * * of a judge of the court", compare then the effect of this constitutional vice on the disciplinary rules governing attorneys' conduct. No longer may attorneys be disciplined because

of their failure to maintain "toward the courts a respectful attitude". Nor will discipline lie under the newly adopted disciplinary rule of the Code of Professional Responsibility of the American Bar Association if an attorney "engage in undignified or discourteous conduct which is degrading to a tribunal". The specificity with which the contempt statute of Louisiana is drafted is highlighted by comparison to the Rules of Professional Conduct to which attorneys are subject and for the violation of which they may be disbarred.

Stern and Gressman, in *Supreme Court Practice*, state:

> "It should be superfluous to add that any scandalous matter, any personal attack on opposing counsel or lower court judge, or any imputation of improper conduct by counsel or court has no place whatever in the brief. * * * When such matter appears, a motion to strike all or a portion of the offensive brief becomes appropriate; or the Court may act on its own motion. Indeed, the Court on occasion has imposed disciplinary sanctions on offending counsel, levying fines, suspending them from practice and even issuing orders to show cause why they should not be disbarred."[50]

If this recitation is correct, the action of this Court in those contempt citations fails to meet the constitutional standards urged by appellant.

The opinions of *Re Sawyer*,[51] decided by this court in 1959, contain some of the best discussion of the issues presented by this appeal. Mrs. Sawyer was defense counsel in a widely publicized and highly emotional Smith Act conspiracy trial in Hawaii. During the course of the trial, she made an

50 *Op. cit.* (f. n. 45, *supra*) p. 477.
51 360 U. S. 622, 3 L. Ed. 2d 1473, 79 S. Ct. 1376 (1959).

out-of-court speech, critical of the Smith Act, of conspiracy trials and, so the Supreme Court of Hawaii thought, of the trial judge. For this speech, disciplinary charges were filed. Mrs. Sawyer was suspended from the practice of law for one year. The finding of the Supreme Court of Hawaii was that the speech "impugned the integrity of the judge presiding * * * and thus tended to also create disrespect for the courts of justice and judicial officers generally * * * ". The majority opinion of Justice Brennan, in which Chief Justice Warren, Justice Black, and Justice Douglas joined, limited the issue of review to the narrow question of whether " * * * the facts adduced are capable of supporting the findings that the petitioner's speech impugned Judge Wiig's impartiality * * * ".[52] This majority opinion concluded that Mrs. Sawyer's comments did not in fact, "impugn Judge Wiig's impartiality and fairness". On this limited finding, the decision below was reversed.[53] Justice Stewart concurred in the result, agreeing there was not enough in the record to support the charge of the finding growing out of the speech. Pertinently, Justice Stewart stated:

> "A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> "Obedience to ethical precepts may require abstention

52 360 U. S. 626, 3 L. Ed. 2d 1478.

53 Justice Black's concurrence in the majority opinion specifically reserved any opinion that Hawaii may have had a law authorizing the suspension of Mrs. Sawyer for her speech; that, if it had such a law, it would be valid; or that she was given the kind of trial she must constitutionally be afforded. 360 U. S. 645, 3 L. Ed. 2d 1488.

from what in other circumstances might be constitutionally protected speech."[54]

Justice Frankfurter wrote a dissenting opinion in which Justices Clark, Harlan, and Whitaker joined. A large part of this dissenting opinion addressed itself to whether or not the pleadings and charges against Mrs. Sawyer alleged action tending to influence or interfere with a pending trial. The opinion suggested that the pleadings were broad enough to encompass interference and that the action of Mrs. Sawyer was clearly calculated to interfere with a pending trial in which she was counsel.[55] Passing, however, from that consideration, this dissenting opinion examined the status of the case assuming the speech could not be considered interference with pending litigation. As to the role of the attorney *vis a vis* free speech in this instance, Justice Frankfurter stated:

> "Even in the absence of the substantial likelihood that what was said at a public gathering would reach the judge or jury, conduct of the kind found here cannot be deemed to be protected by the Constitution. An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense. He does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law: he has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition, ultimately this Court, still exercises judicial power those claims will be heard and heeded.

54 360 U. S. 646, 647, 3 L. Ed. 2d 1489.

55 This activity, then, might well be reprobated under appellant's view of the limitation of free speech if that speech "interferes" with the administration of justice.

> "Certainly courts are not, and cannot be immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so. But when a lawyer goes before a public gathering and fiercely charges that the trial in which he is a participant is unfair, that the judge lacks integrity, the circumstances under which he speaks not only sharpen what he says but he imparts to his attack inflaming and warping significance. He says that the very court room into which he walks to plead his case is a travesty, that the procedures and reviews established to protect his client from such conduct are a sham. 'We are a society governed by law, whose integrity it is the lawyer's special role to guard and champion.' *Re Howell*, 10 NJ 139, 142, 89 A2d 652, 653 (concurring opinion). No matter how narrowly conceived this role may be, it has been betrayed by a lawyer who has engaged in the kind of conduct here found by the Hawaii court. Certainly this Court, the supreme tribunal charged with maintaining the rule of law, should be the last place in which these attacks on the fairness and integrity of a judge and the conduct of a trial should find constitutional sanction."[56]

Thus, as to the right of a state (at that time a territory) to supervise certain conduct of attorneys against a claim of free speech, five (5) justices (the dissents of Justices Frankfurter, Clark, Harlan and Whitaker, and the concurring opinion of Justice Stewart), declared in most unequivocal terms that free speech rights would not permit Mrs. Sawyer to "impugn Judge Wiig's integrity". Four (4) justices did not reach that issue.

Reverting to the instant case, there is no question as to whether or not Mr. Spencer impugned Judge Dixon's integrity: he labeled him "guilty of corruption, favoritism, op-

56 360 U. S. 668, 669, 3 L. Ed. 2d 1500, 1501.

pression and misfeasance in office". The abuse was contained in a pleading filed to that court. The presence or absence of "communication" to the court abused is not at issue.

In 1947, this Court, in *In re Chopak*,[57] had the opportunity to review a constitutional attack on the suspension of an attorney for derogatory remarks made by the attorney to a trial judge. This Court denied certiorari. Chopak felt aggrieved (and, according to the opinion of Circuit Judge Clark, was aggrieved) by a ruling of the federal district judge. He wrote a letter to that judge which was characterized by Circuit Judge Clark in his dissent as "ungentlemanly, if not insulting". In this letter he had described the ruling of the judge as "despotic" and "rule with passion and vehemence". For this letter he was cited for disciplinary proceedings by the district court as having violated Rule 3 of that court. That rule provided in part:

> "Unprofessional conduct on the part of a member of this bar requiring discipline shall include * * * failure to abide by any of the Canons of Ethics of the New York State Bar Association."

The Canons involved were 1 and 3. Canon 1 provided identically to Canon 1 of the Canons of Professional Ethics of the American Bar Association and of the Louisiana Bar Association quoted earlier in this brief.[58] The lower court found his conduct unprofessional and suspended him from practice for three (3) years. The second circuit affirmed; this Court denied certiorari. The dissent of Judge Clark, in the second circuit, directed his divergence from the majority to a possible

57. 66 F. Supp. 265 (DC, ED, NY, 1946), 160 F. 2d 886 (CA2d, 1947), certiorari denied, 331 U. S. 835, 91 L. Ed. 1848, 67 S. Ct. 1516 (1947).
58. 66 F. Supp. 265, see Canon 1, page 24, *supra*.

violation of Chopak's First Amendment free speech rights, relying, as does appellant here, on *Pennekamp v. Florida*[59] and *Bridges v. California*.[60]

It is significant that the punishment in *Chopak* survived a First Amendment attack, although the punishment was for an out-of-court utterance contained in a letter to a judge. Contrasted, Mr. Spencer's attack is contained in a pleading, a public, permanent record. Punishment in *Chopak* was for violation of Canon 1 of the Canons of Professional Ethics commanding a lawyer to "maintain toward the courts a respectful attitude". This is far broader proscription of free speech than that attacked by appellant contained in Article 222 of the Louisiana Code of Civil Procedure. Pertinent, though not controlling, is the fact that apparently Chopak was genuinely aggrieved by the ruling of the district judge,[61] while Spencer had no genuine complaint against Judge Dixon's ruling against him.[62] Chopak's remedy of his real grievance was by appeal. Spencer's remedy of his imagined grievance was the same.[63]

59 328 U. S. 331, 90 L. Ed. 1295, 66 S. Ct. 1029 (1946)
60 314 U. S. 252, 86 L. Ed. 192, 62 S. Ct. 190 (1941)
61 See dissent of Circuit Judge Clark, 160 F. 2d 887
62 See discussion of merits of Judge Dixon's ruling against Mr. Spencer's client on the merits of the separation action, *infra*, pages 42, 43
63 From the ruling complained of by Mr. Spencer in the separation proceeding of *Hopkins v. Hopkins* an absolute right of appeal lay with the Second Circuit Court of Appeal. Constitution of the State of Louisiana 1921, Article 7, Section 29. In Louisiana, appeal is a matter of right to the intermediate courts of appeal in most civil cases tried by district courts. Additionally, the Louisiana Supreme Court has discretionary certiorari jurisdiction to review all decisions of the courts of appeal. Reviews of any recent edition of the Southern Reporter will reflect that the various courts of appeal of Louisiana are not particularly reluctant to reverse trial judges whom they consider in error. In Louisiana, unlike most common law jurisdictions, appeal in civil cases is of both the facts and law. This is true even though the trial in the court of general jurisdiction may have been by jury. The Louisiana constitution grants no right of jury trial in separation or divorce suits. It is important that though Mr. Spencer felt himself so seriously aggrieved by the trial judge's ruling, he did not bother to appeal it. See minutes of the district court (docket entries), A. 1, 2

At 12 ALR 3d 1408, there is an extensive collection of cases involving disciplinary proceedings against attorneys for improper criticism of courts. The editorial comment relates the universal rule that lawyers may not, in intemperate charges, create disrespect for courts or their decisions. The policy stated is the danger that such attacks tend toward a general discrediting of the courts and weakening of the judicial process. Disciplinary action for these attacks is not, save the comment precluded by guarantees of free speech. We collect in footnote 64 the cases from various state jurisdictions relied on in the annotation. We attempt to include cases closely similar in factual situation to this case. We submit that adoption of appellant's argument requires the overruling of all these cases.[64]

64 The state court opinions relied on by the author of that annotation include *In re Phillips*, 109 Cal 471, 18 P 811, 988 [illegible] *Ex parte Lewis*, 262 SW2d 321 (Ky 1999); *In re Finkelstein*, 40 Ohio St 492, 89 NE 59 (1909), wherein the court noted: "Nor can the respondent be justified on the ground of endangered liberty of speech. When a man enters upon a campaign of vilification he takes his fate into his own hands, and must expect to be held to answer for the abuse of the privilege extended to him by the Constitution. An attorney of more than twenty years' standing at the bar must be presumed to know the difference between respectful fair and candid criticism and scandalous abuse of the courts which gave him the high privilege not as a matter of right to be prized at the altar of justice." *State Bar Comm. ex rel. Williams v. Sullivan*, 196 Okla 749, 151 P 703 (1915); *Re Gross*, 41 RI 270, 111 A 893 (1920); *Gregory v. National Bank of Comm.*, 113 P2d 27; *Alaska [illegible] Williams v. Redman*, 52 Ariz 61, 81 P2d 869 (1938); *Bar Assn. of San Francisco v. Phillips*, 38 Cal App 466, 176 P 880 (1918); *People v. State Bar of California*, 219 Cal 218, 26 P2d 19 (1933); *People ex rel. Skelton v. Brown*, 17 Colo 451, 30 P 918 (1892); *State ex rel. Keet v. Maxwell*, 19 Fla 31 (1882); *Petition of Chicago Bar Assn. Standidge*, 351 Ill 361, 184 NE 644 (1933); *People ex rel. Chicago Bar Assn. v. Sherman*, 364 Ill 340, 4 NE2d 472 (1936); *Re Wilson*, 13 Ill 2d 91, 240 NE2d 208 (1968); *In re Smith*, 20 Ind 47 (1863); *Re Hull*, 99 Kan 21, 160 P 1141 (1916); *Bar Assn. v. Nelson*, 201 Minn 240, 276 NW 440 (1937); *Re Fuller*, 166 Minn 211, 91 NW 2d 916, certiorari denied, 361 U S 879, 4 L Ed 2d 71, 80 S Ct 144 (1959); *Re Hiss*, 367 Mass 572, 211 NE2d 740 (1965), certiorari denied, 382 U S 872, 15 L Ed 2d 110, 86 S Ct 151; *Re Hayes*, 84 Neb 600, 121 NW 1124 (1909); *Nebraska State Bar Assn. v. Krueger*, 177 Neb 600, 131 NW 2d 118 (1964); *Re Gilmartin*, 107 NJ Eq 183, 152 A 660 (1931); *Re*

Appellant candidly admits that the constitutional construction urged by him would extend beyond application of the "clear and present danger" criterion now prevailing for outdoor speech and press limitations.[3] Appellant also urges that this Court adopt as a constitutional standard the requirement that prohibited language must constitute an "actual solicitation".

We urge that it is neither appropriate nor indicated by prior Court expressions that a "clear and present danger" or "actual solicitation" standard be enunciated for the first time in this Court concerning control of conduct made by counsel in open court or in pleadings. The danger of creating a dichotomy of literary form concerning protected free speech has

been discussed several times by Justice Frankfurter.[57] He pointed out that "clear and present danger" was a literary term of Justice Holmes, never used to express a technical legal doctrine or convey a formula for adjudicating cases.

> "In its setting it served to indicate the importance of freedom of speech to a free society but also to emphasize that its exercise must be compatible with the preservation of other freedoms essential to a democracy and guaranteed by our Constitution."[58]

Whether or not "clear and present danger" has now become a legal doctrine, as feared by Justice Frankfurter, does not control this case. It has never been utilized to characterize the limitation of a court to control its proceedings. There is a danger, as expressed by Justice Frankfurter, that these literary phrases are made to do service for critical analysis by turning them into dogma. Stated differently, Justice Holmes, in his dissenting opinion in *Hyde v. United States*, said:

> "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."[59]

It would be an equal mistake although not one that would compel the decision in this case urged by appellant if this Court made the term "actual obstruction" a constitutional standard concerning this subject.

[57] See concurring opinion *Pennekamp v. Florida*, 328 U. S. 331, 354, 66 S. Ct. 1029, 1036, 1037, 90 L. Ed. 1295 (1946); dissenting opinion *Bridges v. California*, 314 U. S. 252, 282, 62 S. Ct. 190, 205, 86 L. Ed. 192 (1941).

[58] 328 U. S. at 347, 66 S. Ct. at 1036.

[59] 225 U. S. 347, 391, 32 S. Ct. 793, 798, 56 L. Ed. 1114 (1912).

John Adams wrote of the first Constitution of Massachusetts:

> "It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, and impartial and independent as the lot of humanity will admit."[70]

Free speech is one of our most noble and sacred rights. It has for its protection and preservation only an effective judicial system. If that judicial system can no longer exercise its constitutional mandate in an atmosphere of dignity and order, free speech, as every other freedom we cherish, cannot survive. The observation of Justice Frankfurter in his dissent[71] in *Sawyer* eloquently speaks to this issue:

> "The problem raised by this case — is the particular conduct in which this petitioner engaged constitutionally protected from the disciplinary proceedings of courts of law? — cannot be disposed of by general observations about freedom of speech. Of course, the free play of the human mind is an indispensable prerequisite of a free society. And freedom of thought is meaningless without freedom of expression. But the two great Justices to whom we mostly owe the shaping of the constitutional protection of freedom of speech, Mr. Justice Holmes and Mr. Justice Brandeis, did not erect freedom of speech into a dogma of absolute validity nor enforce it to doctrinaire limits. Time, place and circumstances determine the constitutional protection of utterance. The First Amendment and the Fourteenth Amendment, insofar as it protects freedom

70 Article XXIX of the Declaration of Rights of the Constitution of Massachusetts, 1780.

71 Although a dissenting opinion, the views expressed as to this issue were joined by a majority of the court, four justices not reaching the issue.

> of speech, are no exception to the law of life enunciated by Ecclesiastes: 'For everything there is a season, and a time for every purpose under heaven.' And one of the instances specifically enumerated by the Preacher controls our situation: '[A] time to keep silence, and a time to speak.' Eccles. 3:1, 7. Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise it to castigate courts and their administration of justice. But a lawyer actively participating in a trial, particularly an emotionally charged criminal prosecution, is not merely a person and not even merely a lawyer."[22]

Does Louisiana have a genuine interest in preserving the authority, power and dignity of its courts? Is the questioned statute calculated to achieve this end within constitutional limitations? We submit both questions require an affirmative answer. Institutions are not justified by their forms. This is no less true for courts. Justice, and respect for that justice, will not result solely because judicial proceedings are decorous. Respect for courts of justice is earned only by the quality of justice meted out by courts and the quality of the laws interpreted by courts. It is equally true that if courts are unable to control the decorum and orderly process of proceedings before them, particularly by the officers of the courts, attorneys, they will neither obtain nor deserve the respect which they must have if our liberties endure. Forms of institutions do relate directly to the effectiveness of the institutions. We deal here with a narrow issue of respect pleading content by attorneys. If courts become powerless to punish abuse in pleadings of the type here made, they will be equally powerless, in the broader context, to control their

[22] 360 U. S. 622, 666, 4 L. Ed. 2d 1471, 1499, 79 S. Ct. 1376

proceedings. All proceedings before a court are, after all, only speech. Any court rule, any disciplinary rule, or any legislatively enacted procedure, of necessity deals with speech.

In a true sense, irrelevant criticism of another attorney or a judge or insulting, abusive or discourteous language in court or in pleading is necessarily disruptive of the judicial process. Such conduct, if not promptly punished (with all constitutional safeguards), inevitably impairs the dignity and respect for judicial authority. In an age when the right of free expression is being endangered by mob interruption, when orderly judicial process is being impaired by disorders, the preservation of a system of justice compels that courts be vigilant of the conduct of their proceedings.

We assume that Mr. Spencer's reliance on *Holt v. Virginia* is misplaced. The constitutional issue of free speech was never considered by this Court in *Holt*. The case holds only that a litigant has a constitutional right to a fair trial before an impartial tribunal and that corollary to this right is the right to file motions raising necessary issues (either for recusation of the judge or venue) for protection of this right. This Court did not intimate that the right to file such a motion included a right to deliberately abuse the judge by including language directed to him which was insulting, abusive, or discourteous. The Code of Practice, Articles 221 *et seq.*, in fact, instead of being in conflict with *Holt*, by specific language excludes the possibility of contempt for the exercise of the right granted in that Article 222 interdicts only "irrelevant"

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abuse. This Court in *Holt* held that the allegations of the pleadings were " * * * no way offensive in themselves, but wholly appropriate to charge bias * * * ". If language is "wholly appropriate", it cannot be "irrelevant" to the pleading and thus contemptuous under Article 222.[74] In this case the language "corruption, misfeasance and favoritism" added not one scintilla to the motion to recuse. Its inclusion was an obvious attempt to embarrass the trial judge against whom counsel held animosity.[74]

Appellant argues that the language contained in his motion cannot be abusive or inappropriate because it is "lawyer-like" and simply tracks statutory (constitutional) provisions concerning removal of judges. The fact that a pleading may track a statute does not detract from the abusiveness of that pleading nor add to its relevance. It would be as abusive and as much of a threat to the dignity and authority of a court to file a pleading accusing a trial judge of "murder, rape, burglary, robbery" or any other crime. These words may be "lawyer-like" when used for their appropriate purpose. They are not "lawyer-like" when contained in a pleading in litigation pending before that judge. If a judge be guilty of any of such offenses, or the offenses alleged by appellant, he should be removed from office. Our ethics establish a duty in that regard. This duty does not give an attorney license to make these charges irrelevantly in a pleading.

Louisiana is a fact-pleading state. It does not recognize issue or notice pleading.[75] The charges made by Mr. Spencer

[74] See excerpt from stricken pleading of Mr. Spencer in the earlier federal court part of this proceeding quoted on page 534 of 290 F. Supp.

[75] Louisiana Code of Civil Procedure Article 854. See comments to this article of Louisiana Law Institute published in West La. C.C.P., Vol. 1.

were conclusions, not charges of fact having relevance to the case. Mr. Spencer at no time alleged that the judge was aware of his client's opinion of the judge. He did not allege either what facts constituted the "corruption, favoritism, oppression and misfeasance in office" or any connection of these offenses with the pending litigation. Judged by any pleading standard, but certainly by the standard of fact-pleading, the words were not appropriate to the charge of "interest" in the pending litigation.

III

DUE PROCESS OF APPELLANT'S CONVICTION

Appellant urges[76] that his conviction violated his due process rights because it is unsupported by any evidence. This issue, not dealing with the constitutionality of a state statute,[77] should not be reviewable by appeal under 28 U. S. C. §1257(2). We urge that certiorari should not be granted on this issue.

The citation for contempt alleges that Mr. Spencer, as counsel, filed a pleading containing irrelevant language directed to a trial judge which was scandalous, insulting and abusive, which impaired the dignity of the court and the respect for its authority, contrary to the law of Louisiana.[78] At issue, then, is only: (1) whether or not the pleading was filed by Mr. Spencer, as attorney, containing the language and; (2) was the language, in fact, scandalous, insulting and abusive, in irrelevant criticism of the judge or impairing the dignity of the court and the respect for its authority? Mr. Spencer's authorship of the pleading is admitted.[79]

The constitutional argument is that there was "no evidence"[80] upon which to base the conviction. The pleading containing the allegation, and the record of *Hopkins v. Hopkins* constituted the evidence. The conclusion that the language of

76 Brief of appellant, pages 30-32.

77 On page 32 of appellant's brief, he assumes for the purpose of his argument II the constitutional validity of Article 222 of the Louisiana Code of Civil Procedure.

78 A. 10.

79 A. 18. "THE COURT: I note that you do not disclaim the actual filing which is under yous signature?
MR. SPENCER: No, sir, I concede that."

80 Brief of appellant, page 30.

the pleading violated the statute is a conclusion of the "sufficiency of the evidence", which should not be the subject of constitutional review here. Even so, we submit Judge Williams was perfectly justified, factually, legally and constitutionally in his conclusion.

In order to consider this matter in its correct perspective, the whole circumstance of this contempt citation needs to be considered. This contempt citation issued out of *Hopkins v. Hopkins*, a separation[81] filed in the First Judicial District Court of Louisiana, a court of general jurisdiction. Mr. Spencer represented the plaintiff. As grounds for separation it was alleged that Mrs. Hopkins abandoned Mr. Hopkins.[82] For abandonment to be grounds for separation, two elements must concur: (a) the offending spouse must have withdrawn from the common dwelling without a lawful cause, and (b) the offending spouse must have refused to return.[83] This cause was heard on confirmation of default[84] on March 20, 1968. Testimony was adduced from two witnesses, Louis P. Hopkins, the plaintiff, and his corroborating witness, Mr. Charles Anderson.[85] Mr. Hopkins' testimony was that he and his wife separated as a result of a mutual agreement;[86] that his wife had subsequently refused to return. The corroborating witness, Mr. Anderson, testified that he knew the parties were separated

81 In some instances a judgment of separation in Louisiana is a prerequisite to a divorce. Louisiana Revised Civil Code Article 139

82 A. 3, 4.

83 Louisiana Revised Civil Code; Articles 138(5) and 143

84 The appropriate proceeding for proof of a claim in which no appearance is made by defendant. Louisiana Code of Civil Procedure, Article 1702

85 A. 5-7.

86 A. 6

and that Mrs. Hopkins refused to return.[87] On this evidence only, the matter was submitted. Judge Dixon ruled that the plaintiff had failed to prove his case, stating:

> "The suit is based on abandonment. The testimony of the plaintiff was that he and his wife had an argument and they decided that either he leave or she leave, so he left. That is not an abandonment. The demands of the plaintiff are rejected."[88]

As properly interpreted by the Louisiana Appellate Courts, a separation by agreement is not a withdrawal from the common dwelling without cause, and therefore not an abandonment within the meaning of Revised Civil Code Article 143.[89]

Louisiana grants to litigants who consider themselves aggrieved by lower courts an absolute right of appeal in cases of this nature.[90] Examination of the docket entries (minutes) of *Hopkins v. Hopkins* in this record[91] reveal that no appeal was taken by Mr. Hopkins. The next day, March 21, the motion to recuse giving rise to this contempt was filed by Mr. Spencer.[92] The motion to recuse alleged, in Article 3, that Judge Dixon, "despite overwhelming evidence of the abandonment of petitioner by defendant * * * dismissed plaintiff's suit giving as his oral reason thereof that the plaintiff had not proven a case of abandonment * * *." The motion then, in Article 4, alleged the "corruption, favoritism, oppression and misfeasance in office" of Judge Dixon.

87 A 7
88 A 7
89 *Jardes v. Jardes*, 191 So. 2d 648 (La. 2nd Cir. Ct. of App., 1966); *Scorsine v. Scorsine*, 188 So. 2d 224 (La. 4th Cir. Ct. of App., 1966)
90 Constitution of the State of Louisiana, 1921, Article 7, Section 29
91 A 1, 2
92 A 1

At the hearing for reparation on March 29, there was no colloquy between counsel and judge. Counsel was not prejudiced from introducing any evidence or making any argument. The facts proved simply did not warrant the relief sought. We urge a comparison of these proceedings with the proceedings reported in *Matter of Peters*, 16 Ill. 2d 179. In *Peters* this Court sustained a contempt conviction of an attorney for his remarks to a trial judge despite very strong provocation of the trial judge. We ask also that these proceedings be compared with *In re Hopp*, 29 Ill. 2d 104. According to Judge Craft of the Second Circuit, Hopp was genuinely aggrieved by the actions of the trial judge, almost which he subsequently complained. The Second Circuit affirmed disciplinary proceedings against Hopp. This Court dismissed review. Hopp's remarks were contained in correspondence. Mr. Spencer's remarks are a part of the permanent record of a judicial proceeding.

While these cases should not be controlling, they are presented to consider the circumstances prompting Mr. Spencer's outspoken attack. This Court in *Hopp* cautioned to prevent that the relief for the wrong done him would be aggravated rather than be grounds for his regret at having had the gall to attack the judge doing wrong to him.

A trial judge in allowing attorneys latitude in the range of conduct for which they are sought to stay proceedings is that it encourages other aggrieved litigants to the judicial process to engage in

whatever conduct they may ultimately think proper to discipline that unethical proceeding. We are not without power to correct such disruptions of this type. If attorneys cannot be expected to conduct themselves orderly before courts, we have no right to expect any orderly conduct by any persons. Every commercial litigator has at least one disappointed litigant at the termination of his case which has attracted bilateral sanctions of appeal for those litigants. When that appeal is unavailable, it is difficult to understand the necessity appellant claims exists for the keeping of status provided by Article 922.

Appellant seeks in this Court a denial of appellee's motion that the designations appeals were not his own but were without those of his client. He states that his client was attempting to treat Judge Wiese's removal from office because of that order's entrance by means of corruption. Appellant appears confused and misdirected. His denial of appellee's designations is without merit. The only designations subject to the power of this Court are those designations pleading errors by the trial court in the proceedings before the United States District Court in the original suit of these proceedings. We cannot likewise withdraw the denial of appellee.

Appellant claims that all matters were resolved by the settlement agreement of this case although facts contradicting pursuant to the settlement agreement. This is unsupported by the record. We have already found that appellant's counsel was not authorized to enter into the settlement agreement. We cannot find that the [illegible]

If Mr. Spencer's client had been attempting to remove Judge Dixon from office for any reason, and if Judge Dixon had been aware of such a movement, we still submit that there is no justification for an attorney, who owes a duty of respect and decorum to the courts before which he practices, to include in any pleading the allegation that the judge is corrupt. The repetition of the alleged charge added nothing to the motion to recuse. If a judge is corrupt, if a judge is incompetent, if he is guilty of incompetence, if he exhibits temperament or is guilty of gross misconduct, he should be removed from office, and it is the duty of the bar to take appropriate action that this occur.[10] There is a proper forum for this action. At the time of questions, preceding the oath of counsel were administered, requiring the signature of each lawyer to a citizens' letter which the attorney general was compelled to institute removal proceedings. It was simple and necessary to remind counsel that the abusive language of Mr. Spencer be contained in the motion for recusation.

CONCLUSION

For these reasons we urge: a) that this court lacks jurisdiction; or b) alternatively, that the judgment below be affirmed.

Respectfully submitted,

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State of Louisiana

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Signed: Neil Dixon

Neil Dixon

Attorneys for R. B. Williams,
Respondent Judge

APPENDIX "A"

IN THE SUPREME COURT OF
THE STATE OF LOUISIANA

LEWIS P. HOPKINS, JR.
V.
DIANA McCINTY HOPKINS

No. 19,953

Notice of Appeal to the Supreme Court of
the United States

Notice is hereby given that DIANA SPENCER, the appellant herein, hereby appeals to the Supreme Court of the United States from the final decree of the Supreme Court of Louisiana denying a Writ of Certiorari thereby affirming the judgment of the First Judicial District Court sustaining the validity of Louisiana Code of Civil Procedure Article 3941 which decision of the Supreme Court of Louisiana was rendered on June 26, 1967. This appeal is allowed under the rules of the Louisiana Supreme Court from a refusal of the court to grant writs pursuant to its supervisory jurisdiction. An appeal lies from a contempt conviction in a federal court to the Supreme Court of the United States

APPENDIX "A" (Continued)

This appeal is taken pursuant to 28 U. S. Code, Sec

The Clerk of the Supreme Court of Louisiana will
prepare a transcript of the record in this cause for
consideration by the Court of the United States Supreme Court
and include in said transcript the following:

The entire record in the Supreme Court of Lou
in the case of LEWIS P. HOPKINS, III v. DIANA
MOONEY SPENCER, Number 59425.

The following questions are presented by this appeal:
Whether Louisiana Code of Civil Procedure,
Article 222 and particularly Subsection 3 thereof is invalid
as violative of the Fourteenth Amendment to the Constitu
of the United States and through it, the First Amendment
to the Constitution of the United States, upon the grounds that
it denies the appellant freedom of speech and further that it
denies to appellant due process of law.

Whether there was any evidence that appellant
violated the provisions of Article 222 of Louisiana Code

DIANA SPENCER

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(Certificate omitted)